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IN THE

Supreme Court of the United States

October Term, 1963

No. 349

MARION J. BERGUIDO, individually, MARION J. BERGUIDO, ROBERT G. ROWE and WARREN H. WOODRING, Executors of the Estate of CARLOS BERGUIDO, JR., and JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO and CARLOS BERGUIDO, 3d, by their Guardian, MARION J. BERGUIDO,

Petitioners,

v.

EASTERN AIRLINES, INCORPORATED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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OCTOBER TERM, 1963

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MARION J. BERGUIDO, INDIVIDUALLY, MARION J. BERGUIDO, ROBERT G. ROWE AND WARREN H. WOODRING, EXECUTORS OF THE ESTATE OF CARLOS BERGUIDO, JR., AND JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO AND CARLOS BERGUIDO, 3D, BY THEIR GUARDIAN, MARION J. BERGUIDO,

Petitioners

v.

EASTERN AIRLINES, INCORPORATED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

MARION J. BERGUIDO, individually, MARION J. BERGUIDO, ROBERT G. ROWE and WARREN H. WOODRING, Executors of the Estate of CARLOS BERGUIDO, JR., and JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO and CARLOS BERGUIDO, 3D by their Guardian, MARION J. BERGUIDO, by their attorneys, respectfully petition that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on March 25, 1963.

OPINIONS BELOW.

The opinion of the Court of Appeals of March 25, 1963 is reported at 317 F. 2d 628. On the basis of that opinion the United States Court of Appeals for the Third Circuit entered judgment reversing the judgment of the United States District Court for the Eastern District of Pennsylvania in favor of plaintiff and remanding the case for a new trial.

The opinion of said Court of Appeals denying plaintiff's timely Petition for Rehearing was filed May 28, 1963 and is reported at 317 F. 2d 633. Circuit Judges Kalodner and Hastie dissented from the denial of said Petition and Judge Kalodner filed his own dissenting opinion.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on March 25, 1963. Plaintiff's Petition for Rehearing in said Court was timely filed on April 9, 1963. Defendant filed no answer or brief in opposition thereto. Said Petition was denied by order entered May 28, 1963. The jurisdiction of this Court is invoked under c. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Where in a federal jury trial of an air catastrophe case arising under the Warsaw Convention, 49 Stat. 3000, the record reveals that the trial judge had before him evidence which fairly supported a finding on a preliminary question of fact that the testimony of the head of the Structures Group of the Civil Aeronautics Board team did not contain hearsay because that C. A. B. official personally investigated the crash, checked the entire report and approved it as coinciding with his own personal knowledge of the facts:

(a) was not the dissenting opinion in the Court of Appeals correct when it asserted that the majority

did violate the Seventh Amendment of the U. S. Constitution by substituting its factual finding for that of the jury by misstating the record, accepting the credibility of oral testimony of defendant's expert to the exclusion of plaintiff's conflicting testimony, and then basing its finding of hearsay upon such misstatement and assessment of credibility?

(b) is not the Court of Appeals, which is in conflict on this question with the established law in this Court and other Courts of Appeals, erroneously usurping the trial judge's function by reversing such fairly supported preliminary finding of fact?

2. In excluding the testimony of the head of the Structures Group of the Civil Aeronautics Board team regarding information contained in his governmental report from which he testified, was not the Court of Appeals in error in so construing the Federal Business Records Act, 28 U. S. C. § 1732, as to reject the test of "trustworthiness" heretofore soundly established by decisions of this Court and various Courts of Appeals, including the Third Circuit, and substituting for such long-standing authoritative test the following novel, statutorily unwarranted, and confusion-breeding pre-conditions for admissibility under the Act, viz.:

(a) the business record must not contain hearsay, notwithstanding express statutory provision to the contrary?

(b) the offered proof must be of such a nature that it would be competent evidence if testified to by its maker?

(c) the business record must not contain opinion?

(d) in an air catastrophe case such as this, § 1441(e) of the Civil Aeronautics Act provides: "explicit congressional policy" against the admission of the evidence contained in the report, even though this

very same opinion of the Court of Appeals had immediately previously explicitly held to the contrary that such evidence was not barred by § 1441(e)?

THE STATUTES INVOLVED.

I. The Federal Business Records Act, 28 U. S. C. 1732(a) provides as follows:

> (a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of an act or transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
>
> The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

II. The Warsaw Convention, 49 Stat. 3000, provides as follows:

Article 17.

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 20(1).

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

Article 22(1).

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

Article 25(1).

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

III. 28 U. S. C. § 2106 provides:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 646, 62 Stat. 963.

STATEMENT OF THE CASE.

Jurisdiction of the District Court in this suit for damages was invoked because of diversity of citizenship, petitioner (hereinafter "plaintiff") being a citizen of Pennsylvania and respondent (hereinafter "defendant") being a citizen of Delaware.

Petitioner's decedent, a distinguished member of the Philadelphia Bar, international practitioner, author and linguist (361a-363a, 367a-374a, 377a) [1] was killed on December 21, 1955 near Imeson Airport, Jacksonville, Florida. He was a passenger on respondent's Miami-to-New York Constellation flight which crashed in the early hours of the morning. There were no survivors.

The trial judge bound the case to the treaty known as the "Warsaw Convention", 49 Stat. 3000, because decedent had purchased tickets for the aforesaid domestic flight at the same time he purchased tickets for an earlier overseas flight. Being so bound, plaintiff was compelled to carry the burden of proving defendant's wilful misconduct in order to recover more than a limit of $8,300 [2] established by the Convention.

While the trial record is voluminous and technically complex, little detail need be narrated to give this Court a full comprehension of the matters raised by the instant petition.

Plaintiff's proof of defendant's wilful misconduct was overwhelming. The jury was shown that defendant made a deliberate, catastrophic attempt to beat deteriorating weather into Jacksonville before the airport closed down. In parlance well understood by flight personnel, defendant

1. All subsequent "a" references are to the pagination in defendant's Appendix below. All subsequent "b" references are to the pagination in plaintiff's Appendix below.

2. This amount is recoverable in the event an air carrier cannot carry its treaty-imposed burden of disproving what amounts to its negligence. Defendant here admitted it could not disprove its negligence (591a).

was attempting a "sneak-in": a pilot's regulation-violating attempt to go below authorized weather minimums in an attempt to get visual contact with the runway in order to land (284a, 285a, 352a). Defendant's expert admitted having heard that pilots had practiced "sneak-ins" during the era of the crash, and admitted that the practice was illicit (543a).

The opinion of the Third Circuit below characterized this case as "thoroughly and exhaustively prepared" (2c).[3] Here follows a résumé of the extensive and overwhelming proof plaintiff marshaled for the jury.

1. Experts explained the technical approach controls operating at the airport (76a-77a, 158a-176a, P-2, P-3).

2. Documents and experts spelled out the regulations governing the flight's approach to the airport (21a-23a, 162a, 27a, 175a-176a, P-3, 196a, 544a, 26a).

3. Airborne and ground equipment was proven to be functioning properly at and before the crash (273a, 41a, 85a-86a, 221a, 51a).

4. The weather was shown to be steadily deteriorating. There was fog from the ground up (28a, 29a, 34a, 87a, 122a, 178a, 320a).

5. The record shows that at impact the plane was flown outside the compulsory funnel-like path delineated by the technical controls, below authorized weather minimums, and ¾ of a mile short of the runway threshold (283a, 231a-232a, 274a, 544a).

6. Plaintiff's evidence demonstrated that during the last 200 feet of the flight path the plane's angle of descent was 2½ degrees and its rate of descent was 10 feet per second (248a). At impact the aircraft was turned in an 11½-

3. All subsequent "c" references are to the pagination of the Appendix to this Petition.

degree right bank, 4¾-degree nose-up position (229a), and was moving at 140 knots (246a, P-3).

From this wide and deep evidentiary foundation in the record, the jury was fully justified in finding that the pilot intentionally violated several CAA regulations shortly before the crash and that those violations were not due to malfunction of any ground or airborne equipment.

Furthermore, plaintiff's two well-qualified aeronautical experts testified that the plane was under full pilot-control when the regulations were violated, and that a "sneak-in" was being attempted (290a, 349a).

Aside from defendant's passing vague effort to establish the presence of supposed jets in the area (483a, 448a) (which plaintiff crushed by authoritative rebuttal testimony [50a, 78a, 82a, 554a-556a, 558a-559a, 565a-566a]), the whole defense of the case rested on defendant's studied, deliberate representation to the jury that it had no knowledge of what happened (158b). In the final analysis, defendant chose to base its whole case on what it argued was an unfathomable mystery.

After trying the case with noteworthy care and ruling on the admissibility of the deposition testimony, Chief Judge Clary meticulously charged the jury, and then submitted the case upon two written interrogatories. One of them went solely to whether defendant was guilty of wilful misconduct as the trial court had very accurately defined it, and the other went solely to plaintiff's damages.

On November 1, 1961, after extensive deliberation spanning a period of over 24 hours (including dismissal for the night), the jury answered the interrogatories with a finding of defendant's wilful misconduct and a finding of damages in the sum of $454,658 (604a, 617a).

Defendant then filed various post-trial motions assigning 74 separate and distinct grounds of alleged error (619a) which, after due consideration, Chief Judge Clary denied on March 29, 1962 (620a).

On March 25, 1963 the Third Circuit rejected all of defendant's allegations of error save one. The reversal was based upon one alleged error: that the deposition testimony of Searle, who was head of the Structures Group of the Civil Aeronautics Board team (237a) which investigated the crash, contained some hearsay.

Searle had personally investigated the crash (237a). He wrote the Structures Committee Report (239a). He supplied facts and figures to Schmidt who performed certain mathematics upon them (252a). *Searle then checked the report which included Schmidt's mathematics and found it to be true and conform to the evidence* (239a). Seizing upon Schmidt's calculations, the Court of Appeals reached the extraordinary conclusion that this part of Searle's testimony was hearsay; that it formed a part of the hypothetical question plaintiff put to her experts, and that therefore reversal would be ordered.

Because of the Court of Appeals' critically important error both of fact and law on this point, plaintiff timely filed a Petition for Rehearing on April 9, 1963 specifically calling the Court's attention to both types of error and very exactly to certain decisive misstatements of fact in the opinion.

Furthermore, in her Petition plaintiff demonstrated, on the Third Circuit's own precedent, that if a new trial had to be granted, it should be limited to the issue of liability in view of the jury's separate findings and the trial judge's specific intention of avoiding a new trial on both issues (liability and damages) should any error be found (579a).

Defendant filed no answer to plaintiff's Petition for Rehearing nor did it respond in any form to contravene plaintiff's allegations of error. It is of particular significance that defendant made no effort to dispute plaintiff's allegations that the Third Circuit had misstated facts decisive to its decision.

On May 28, 1963, the Third Circuit denied the Petition for Rehearing, *per curiam*, making no discernible response to our assignment of misstatements of the record.

Judges Kalodner and Hastie dissented from the denial of plaintiff's Petition. Writing for himself, Judge Kalodner held that (1) there was no "hearsay"; (2) the record did not sustain the majority's statement of it; (3) *the majority usurped plaintiff's right to trial by jury;* (4) defendant acquiesced at trial in the error of which it later complained by posing to its expert witness virtually the same hypothetical question that plaintiff put to her expert witnesses and (5) that any new trial should be limited to the issue of liability in view of Third Circuit precedent.

This Petition followed.

REASONS URGED FOR GRANTING WRIT.

1. The Court of Appeals summarily substituted its finding of fact for that found by a jury on a simple factual issue on which there was a conflict in the evidence, and thus deprived the plaintiff of her constitutionally guaranteed right to trial by jury which the trial judge had given her. In so doing, the Court of Appeals placed itself in square conflict with the following decisions of this Court: *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29, 64 S. Ct. 409 (1944); *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946); *Wilkerson v. McCarthy*, 366 U. S. 53, 69 S. Ct. 413 (1949); *Rogers v. Missouri Pac. R. Co.*, 352 U. S. 500, 77 S. Ct. 443 (1957); *Byrd v. Blue Ridge Rural Elec. Corp.*, 356 U. S. 525, 78 S. Ct. 893 (1958); *Dick v. N. Y. Life Ins. Co.*, 359 U. S. 437, 79 S. Ct. 921 (1959); *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U. S. 355, 82 S. Ct. 780 (1962).

2. The long established rule that an appellate court will not upset a trial judge's preliminary determination of a fact for the purpose of admitting evidence where such finding of fact is fairly supported by record testimony was rejected by the Court of Appeals, and in doing so it created

a conflict with this Court's landmark decision in *Gila Valley, G. & N. R. Co. v. Hall*, 232 U. S. 94, 34 S. Ct. 229 (1914), the authority of which has never heretofore been questioned or diluted. To allow such an invasion into the classic function of the trial judge will cast the gravest doubt upon untold numbers of admissibility rulings which must be made daily in federal litigation.

3. There is involved in this case a question of the construction and application of a federal statute invoked in virtually every trial in the federal courts today:—The Federal Business Records Act, 28 U. S. C. § 1732. The test for the admission of such records as heretofore established by this Court and a number of Circuit Courts has been the "trustworthiness" of the record. The Third Circuit has now virtually destroyed the reasonably uniform application, the usefulness, and the congressional purpose behind the statute by prohibiting the admission of such records if they contain:

(a) hearsay;

(b) opinion;

(c) lack of personal knowledge of the maker; or,

(d) any information obtained by the Civil Aeronautics Board even in cases such as this where counsel for the C. A. B. was present at the taking of the questioned testimony and expressed the opinion that such information as was here given and admitted in evidence did not fall within the proscription of the Civil Aeronautics Act.

4. The result of the decision of the Court of Appeals is thus to cause the most serious problems for bench and bar in administering federal litigation throughout the nation and create substantial conflict with the following authorities:

A. The Supreme Court of the United States. *Palmer v. Hoffman*, 318 U. S. 109, 63 S. Ct. 477 (1943).

B. Other courts of appeals. *Wheeler v. U. S.*, 211 F. 2d 19 (1953); *White v. Zutell*, 263 F. 2d 613 (C. A. 2, 1959); *Terrasi v. South Atlantic Lines*, 226 F. 2d 823 (C. A. 2, 1955); *Puggioni v. Luckenbach*, 286 F. 2d 340 (C. A. 2, 1961); *Pekelis v. Transcontinental & West Air*, 187 F. 2d 122 (C. A. 2, 1951); *U. S. v. Ware*, 247 F. 2d 698 (C. A. 7, 1957); *Glawe v. Rulon*, 284 F. 2d 495 (C. A. 8, 1960); *Lew Moon Cheung v. Rogers*, 272 F. 2d 354 (C. A. 9, 1959).

C. The Third Circuit itself. *Moran v. Pittsburgh Des-Moines Steam Company*, 183 F. 2d 467 (C. A. 3, 1950); *Bartkoski v. Pittsburgh & Lake Erie R. R. Co.*, 172 F. 2d 1007 (C. A. 3, 1949); *Norwood v. Great American Indemnity Co.*, 146 F. 2d 797 (C. A. 3, 1944).

I.

The Court of Appeals Usurped the Function of the Trial Judge and Unconstitutionally Interfered With Plaintiff's Right to Trial by Jury.

While this record is voluminous and technically complex, the point involved here can be grasped swiftly by focusing on these few facts. A reading of a few pages of the testimony of plaintiff's witness, Captain Cann, gives a complete, yet brief and lucid statement of the facts and plaintiff's theory of liability (349a-352a).

The CAB conducted a thorough investigation of the crash. Searle was head of the Structures Group of the CAB investigating team (215a-256a). He gave testimony at trial through his deposition at which the CAB was represented by counsel. CAB counsel's announced function there was to assure that CAB employees subpoenaed to testify would not express opinions as to the cause of the accident and to limit the witness' testimony to first-hand information (73b-74b).

Searle uncovered the physical facts at the crash scene and wrote the Structures Committee report (239a). Searle then supplied these facts to Schmidt who performed certain mathematics upon these facts (252a). *According to the record, that is all that Schmidt did.* Whatever Schmidt did, he did under Searle's direction and supervision. After Schmidt did this, Searle checked the report through and found it to be true and conformed to the evidence (239a). This included Searle's recheck of Schmidt's mathematical computation based on figures supplied by Searle.

Out of a record in this posture the Court of Appeals announced that it found alleged reversible error. It did so in this remarkable language (Opinion, pp. 6-7).

> "Although the actual mathematical calculations might, in themselves, have been 'simple', the *cross-examination of Searle* and the later testimony of defendant's expert witness, La Vake, make it plain that Schmidt had to make certain assumptions and choices relative to the physical facts found at the crash scene before he could reach the final computation stage. Furthermore, the testimony of Searle indicates that he had no knowledge of how Schmidt arrived at his final figures and what *assumptions were made in the process.*" (Emphases supplied.)

Thus was the label "hearsay" stamped upon Searle's testimony. The fact finding by the Court of Appeals that Schmidt had to make certain assumptions is extraordinary for it has no basis in the record. If we are correct, the very pivot on which the whole decision below turns is destroyed.

When the opinion issued we hastened to file a Petition for Rehearing pages 2-4 of which very pointedly drew the Court's attention to the errors in question. In view of the fact that the appeal literally turned on this mistreatment of the record, we fully expected defendant to answer our peti-

tion by attempting to counter our charge with record testimony supportive of the Court's view. Defendant did not do this. Instead, for reasons best known to itself, it stood mute and filed neither answer nor brief in opposition.

The Third Circuit then had before it not only a record which, in its utter silence, condemned the above-quoted finding, but the dissent of Judge Kalodner which very accurately held that:

> "The record does not sustain this Court's factual determination that 'Schmidt' . . . had to make certain *assumptions* and choices relative to the physical facts found at the crash . . ." (41c)

Certainly, once the dissent was written one would fairly expect the majority to answer specifically its brother's serious charge. But the majority did not do this. Instead, it labeled the points raised by the dissent a "repetition of plaintiff's position . . . on the original appeal"; declared that they were ". . . based on a restrictive reading of the record . . ."; and then concluded that the points were "fully covered in the court opinion".

Not until the first opinion issued below was there any question of a judicially misstated record. The promulgation of that opinion marked the injection of this serious issue into the case for the first time. In view of the fact that the first opinion itself misstated the record, how could the Court reply that Judge Kalodner's subsequent protest of the misstatement had been "fully covered" by the error-generating opinion?

More importantly, wherein has Judge Kalodner indulged in a "restrictive reading of the record"? In view of the magnitude of the issues at stake here, the vast expenditures of time and resources in the preparation and trial of this cause, the utmost care shown by Chief Judge Clary, and the fundamental rights involved, we submit defendant owes a deep obligation to this Court to come for-

ward now and either produce documentation from this trial record to support the majority's findings regarding Schmidt's "assumptions" or confess the grave error in the opinion below.

To reach the erroneous finding and the consequent conclusion of a reversal, the Court below committed two juridical acts, one of which was an extraordinary violation of the rule in *Gila Valley, G. & N. R. Co. v. Hall*, 232 U. S. 94, 34 S. Ct. 229 (1914), and the other of which was a breach of the Seventh Amendment of the Federal Constitution. Either of these, standing alone, would support the grant of this Petition.

A. The Trial Record Fairly Supported the Trial Judge's Finding That Searle Actually Checked the Calculations of Schmidt and That Schmidt Did Not Make Any Assumptions. The Court of Appeals Therefore Had No Power to Rule That the Evidence Was Inadmissible.

On the trial record, Chief Judge Clary could have admitted Searle's testimony about the calculations either on a finding that: (1) Searle actually checked Schmidt's calculations of figures Searle had himself supplied and therefore they were not hearsay at all or (2) that they were not hearsay because the record did not support a preliminary finding of fact that Schmidt had made any assumptions.

1. *Searle verified the calculations.*

The trial record showed that the subject computations ". . . were the direct responsibility of Searle, as chairman of the Structures Committee . . . ." (5c). At 239a Searle testified as follows:

> "Q. And are you the man that wrote this report?
> A. Yes.

Q. You checked it through and checked it against the facts you had found in this case?

A. That's correct.

Q. And you found the facts therein to be true?

Mr. Jones: Objected to.

Q. Were the facts true based on the evidence?

A. That is correct, on a summary report.

Q. Do you have a copy of that report in front of you?

A. Yes."

Thus the record is clear that Searle personally checked the entire report. It is certainly a fair inference, and one fully justified by ordinary usage of the English language,[4] that this man who was officially responsible for the entire report personally verified the subject calculations.

While later testimony reveals that Schmidt had occasion to make the calculations, and that Searle did not initially do so, that is neither Searle's admission (1) of his incompetence to do so, nor (2) a denial that he checked the mathematics done by Schmidt.

Having heard the testimony that ". . . the figures were drawn up by . . ." Searle (252a) and that he checked the entire report, defendant was free to ask him specifically what figures he supplied, what he did to check the calculations and whether he was competent to do so. It did not do so. It was a record in that posture which the trial judge

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4. "check . . . 7 . . . b. To verify, or to examine, test, or compare, by means of a check . . . so as to determine or secure accuracy, completeness, efficiency, or the like; as to *check* an account, experiment, or result; also to examine the work of (a person) for this purpose . . .

8. To verify or support by corresponding item for item."

Webster's New International Dictionary, Second Edition Unabridged.

had before him. The Court of Appeals had the same record.

With such a trial record before him the trial judge was patently justified in deciding as an incidental question of fact preliminary to the admissibility of the evidence that Searle did verify Schmidt's calculations. Certainly no definition of the word of art "hearsay" could be related to any part of Searle's testimony given here.

2. *There is no evidence of any assumptions.*

Searle was asked on cross-examination whether he knew of his own knowledge that Schmidt had made any assumptions and his answer was "No, sir" (254a). There is no other statement by Searle or anyone else in *plaintiff's* case that Schmidt made any assumptions. It is a liberty indeed to draw from such testimony the conclusion that any assumptions at all were made. The trial judge refused to draw such conclusion and again he was justified in determining as an incidental question of fact preliminary to the admissibility of the evidence that the trial record at this juncture of the trial did not support a conclusion that Schmidt made any assumptions.

3. *The conflict with holdings of this Court and the Sixth Circuit.*

In reversing the trial judge and taking away from him his absolute right to reach these conclusions with respect to preliminary questions of fact governing the admissibility of evidence, the Third Circuit made a decision which is in utter conflict with *Gila Valley, G. & N. R. Co. v. Hall*, 232 U. S. 94, 34 S. Ct. 229 (1914).

At issue there was whether certain conversation had been heard by plaintiff. In language which admits of no doubt, this Court unanimously held per Mr. Justice Pitney at 34 S. Ct. 232, 232 U. S. 103:

"It is insisted that the conversation was admissible as proving notice to Hall of the condition of the wheel; and so it was, provided it appeared that he heard it. Whether he did hear it was, of course, a question of fact. Plaintiff in error contends that this should have been submitted to the jury, with an instruction that if they believed Hall heard the conversation, they might take that into consideration in determining whether he knew the condition of the wheel and the effect of using it in that condition.

"We agree that the testimony was such as to render it a matter of doubtful inference whether Hall heard the conversation; *but we think this question of fact was one to be determined by the trial court, and not by the jury.* Questions of the admissibility of evidence are for the determination of the court; and this is so whether its admission depend upon matter of law or upon matter of fact. *And the finding of the trial judge upon such a preliminary question of fact is not subject to be reversed on appeal or error if it be fairly supported by the evidence, as it is in the case before us.* Bartlett v. Smith, 11 Mees. & W. 483, 485, 12 L. J. Exch. N. S. 287, 7 Jur. 448, 11 Eng. Rul. Cas. 177; Doe ex dem. Jenkins v. Davies, 10 Q. B. 314, 323, 16 L. J. Q. B. N. S. 218, 11 Jur. 607; Congress & E. Spring Co. v. Edgar, 99 U. S. 648, 658, 25 L. ed. 487, 490; Stillwell & B. Mfg. Co. v. Phelps, 130 U. S. 520, 527, 32 L. ed. 1035, 1037, 9 Sup. St. Rep. 601; Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 559, 35 L. ed. 270, 273, 11 Sup. Ct. Rep. 653; State v. Monich, 74 N. J. L. 522, 526, 64 Atl. 1016; State v. Tomassi, 75 N. J. L. 739, 743, 69 Atl. 214; Gorton v. Hadsell, 9 Cush. 508, 511. And see Tayloe v. Riggs, 1 Pet. 591, 597, 7 L. ed. 275, 277." (Emphases supplied.)

See also the holding in *Ranger, Inc. v. Equitable Life Assur. Soc. of U. S.*, 196 F. 2d 968, 972 (C. A. 6, 1952);

with which the decision below is now in conflict, as well as IX *Wigmore on Evidence* § 2550 (3rd Ed.); *McCormick Handbook of the Law of Evidence* § 53.

The departure by the Court of Appeals from this vital settled rule of trial procedure raises a conflict which casts serious doubt on what has traditionally and properly been recognized as the exclusive power of the trial judge.

B. The Court of Appeals' Treatment of Witness La Vake Was an Absolute Usurpation of the Jury's Function in Violation of the Seventh Amendment.

Defendant produced one expert on liability, La Vake. The jury's verdict in plaintiff's favor is the most telling statement one could make of the credibility of that testimony. The Seventh Amendment of the U. S. Constitution leaves exclusively to the jury the right to make such assessments. It most clearly does *not* permit an appellate court to substitute its assessment of the credibility of the witnesses for those of the jury. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U. S. 355, 82 S. Ct. 780 (1962). Indeed, it does not permit even the trial judge to decide which of two conflicting statements of fact is accurate. That function absolutely and undeviatingly resides exclusively with the jury.

Notwithstanding the strict constitutional limitations upon it, the Court below made exactly such a substitution and then used it to take plaintiff's verdict from her.

How this came about is clearly announced in the first opinion below in these words:

> "Although the actual mathematical calculations might, in themselves, have been 'simple', the cross-examination of Searle *and the later testimony of defendant's expert witness, La Vake, make it plain that Schmidt had to make certain assumptions and choices* relative to the physical facts found at the crash scene before he

could reach the final computation stage." (Emphasis supplied.) (7c)

The cross-examination of Searle just simply did *not* elicit any admission that any assumptions were made by Schmidt. When asked whether he knew whether any such assumptions had been made by Schmidt, Searle answered as previously noted, "No, sir" (254a). Certainly this question and answer on cross-examination did not prove that any "assumptions" were indulged in by Schmidt. Hence in *plaintiff's* case the record contains not an iota to sustain the court's basic premise on which it bottomed its critical *ratio decidendi* above.

It is serious enough to say of this judicial *finding* that it is a misstatement of La Vake's testimony. That testimony spoke only of *one*, not a plurality, of assumptions (538a).

Of a different order of gravity, however, is the raw truth that the court below simply pinned upon the oral testimony of La Vake, a witness called by the *defendant in its case*, the label of "credible" after the jury had declined to do so as only it could under the VII Amendment.

As Judge Kalodner aptly wrote in his dissent from the denial of our Petition for Rehearing:

> ". . . it appears that our determination that Schmidt had made 'assumptions' rested on the opinion expressed by La Vake, defendant's expert, that he must have done so. On this score, it must be noted that the trial judge had specifically—and correctly so—instructed the jury that it was its duty 'to determine' whether the hypothetical questions put to all the experts 'have any assumptions that were not established by the evidence.' The jury's verdict in favor of the plaintiff establishes that the evidence was not based on 'assumptions' and in making a contrary determination we

> usurped the jury's function of choosing between Searle's testimony that no assumptions had been made and La Vake's *estimate* to the contrary. In doing so we disregarded the Seventh Amendment of the Constitution." (12c)

This Court has always been diligent to protect a litigant's rights under the Seventh Amendment. Indeed, the court has conscientiously protected this right in more than 150 cases in the last ten years in not only FELA and Jones Act cases, but in common law litigation as well. It has not hesitated to issue the Writ sought here to restore those rights when they have been taken away by appellate courts. We respectfully submit that it should do so here, for it was only through this invasion of the jury function that this solitary point was found to be error.

II.

The Conflicts Created by the Interpretation of the Federal Business Records Act.

The Court of Appeals has held that certain testimony of Searle was inadmissible because it was hearsay. The information about which Searle testified was contained in and was identical with his committee report. Plaintiff therefore contended in the Court of Appeals that since the committee report itself was admissible under the Federal Business Records Act (28 U. S. C. § 1732) it was harmless error to allow Searle to testify to the calculations contained in the report.[5]

The Court of Appeals rejected that argument and in so doing interpreted this important federal statute in a man-

5. As indicated at 251 (a r.), the witness had little or no recollection of the detailed facts now attacked by the defendant and relied on his rereading of his official C. A. B. structures report to give him a present recollection which in actuality was in *haec verbis* with the report.

ner which renders it worthless not only in all air disaster cases where it is so vitally needed, but also in all other vast additional areas of litigation. Moreover, this decision is in conflict with prior Third Circuit decisions, in conflict with decisions of other Circuits, and rejects the rationale of this Court's decision in *Palmer v. Hoffman*, 318 U. S. 109, 63 S. Ct. 477 (1943).

The Act is almost certainly the most frequently used statute in federal court litigation. The ease and facility of proof intended by this statute should not be so tortured to meaninglessness. This Court should grant certiorari, resolve the conflicts created and restore uniformity in the application of the statute.

A. The Conflict Within the Third Circuit.

For a number of years the Third Circuit had been developing a body of statutory interpretation which treated the Business Records Act in a clear and consistent manner. Illustrative of this development are cases involving the following records: hospital and service records, *Norwood v. Great American Indemnity Co.*, 146 F. 2d 797 (C. A. 3, 1944); statements in the records of an examining physician, *Ettelson et al. v. Metropolitan Life Ins. Co.*, 164 F. 2d 660 (C. A. 3, 1947); hospital records from admission to death, *Bartkoski v. Pittsburgh & Lake Erie R. Co.*, 172 F. 2d 1007 (C. A. 3, 1949); police chief report with photographs and summaries of witnesses' statements, *McKee v. Jamestown Baking Co., Inc.*, 198 F. 2d 551 (C. A. 3, 1952); way bill, *United States v. Olivo*, 278 F. 2d 415 (C. A. 3, 1960).

Two other cases in the Third Circuit warrant discussion. One is noteworthy because of its remarkable identity with this case and the erroneous treatment it has now received: *Moran v. Pittsburgh Des-Moines Steel Co.*, 183 F. 2d 467 (C. A. 3, 1950). The other is *Gordon v. Robinson*, 210 F. 2d 192 (C. A. 3, 1954), where an unexceptionable result was reached for a wrong reason and was appar-

ently relied upon here to avoid the impact of a previously consistent body of law.

Moran v. Pittsburgh Des-Moines Steel Co., supra, is simply indistinguishable from this case save that ours more compellingly calls for admissibility.

The majority distinguishes *Moran* by finding there the absence of any Bureau of Mines statutory provision comparable to the C. A. B. statute here barring the use of portions of accident reports. Since the majority here initially in this self-same opinion disposed of any problems of C. A. B. statutory privilege, it is a complete non-sequitur to assert that such privilege could be the basis for distinguishing *Moran*. Once privilege is taken from this case, it is on all fours with *Moran*.

The Court's construction and application of the statute in *Moran* drives this case into an a fortiori situation.

(a) 49 U. S. C. A. § 582(a)(5) imposes upon the C. A. B. statutory duties to prevent accidents indistinguishable from those with which the Bureau of Mines was charged in *Moran*.

(b) 49 U. S. C. A. § 582(a)(2) and (4) charge the C. A. B. with further duties equally indistinguishable from Bureau of Mines' responsibilities.

(c) The questioned report, as in *Moran*, was prepared in obedience to those statutory commands.

(d) The making of such a report was unassailably part of the C. A. B.'s business.

This report was no less the record of an "occurrence" or "event" than that in Moran. Congress required this report as much as it did that in *Moran*.

The stage set in *Moran* was the stage set here, but the report in *Moran* was qualitatively and potentially more objectionable than the one here. There the report drew what

Judge Goodrich at 183 F. 2d 473 very accurately called "conclusions". As an examination of the *Moran record*[6] discloses, the report there was replete with the rawest kind of hearsay material uniquely absent here. There one finds lengthy discussion of (1) numerous possibilities; (2) historical information; (3) results of laboratory tests; (4) possible causes of disaster; (5) possible causes of failure. If hearsay of any kind was involved instantly, it most certainly was not nearly as qualitatively or quantitatively significant as in *Moran*. *Moran* provided the clearest kind of direction to follow in air disaster cases.

Gordon v. Robinson, 210 F. 2d 192 (C. A. 3, 1954), is the first discord. It was decided with that majority's frank recognition that there were "variances" in interpretation of the statute. Very significantly, Judges Goodrich and Hastie reserved any opinion on the question of the Business Records Act.

That case attached an erroneous precondition to a record's admissibility under that statute. It ". . . should be of such a nature that it would be competent evidence if testified to by its maker" (at 198). Such a view is starkly contradicted by the very language of a portion of paragraph 2 of the statute which states:

> ". . . : lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility."

Furthermore when at page 196 the *Gordon* majority speaks of a Congressional purpose to admit entries, ". . . not dependent upon . . . opinion . . .", its rationale generated open conflict with the holdings of many of the cases previously decided in the Third Circuit, notably those involving opinion material. To understand *Gordon's* error

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6. Plaintiff's Exhibit 20, 467a-483a, Court of Appeals for the Third Circuit No. 10088.

is simply to understand that it displaced *trustworthiness* with the two alien factors just mentioned. That is why one may fairly find a correct result in *Gordon*, but an erroneous rationale. The record was inadmissible, not because it was (1) opinionated, speculative, or conclusory, but because it was (2) untrustworthy. An opinion is not necessarily untrustworthy, and the error of *Gordon* is to make just such an equation.

The material in the *Gordon* document was totally unlike that here. We mention *Gordon*, however, because never before *Gordon* or until now has the rationale enunciated there been accepted by the Third Circuit.

That same rationale now stands as an immediate and direct threat to the Congressional purpose underlying the Act.

It is clear therefore that there is a definite and unmistakable conflict between the decision in the instant case and the decision in *Moran*, *supra*.

B. Conflicts Between the Circuits.

The substantive confusion which now obtains in the Third Circuit is symptomatic of widespread conflict among other Circuits. The situation, we respectfully submit, has become intolerable from the point of view of administering federal litigation with reasonable uniformity. Only this Court can bring about a uniformity producing rule.

Reference to two cases will suffice to illustrate both the conflict in the circuits and the importance of the question. These cases are *Thomas v. Hogan*, 308 F. 2d 355 (C. A. 4, 1962) and *Lyles v. United States*, 254 F. 2d 725 (C. A. D. C., 1957).

In *Thomas v. Hogan*, *supra*, the Fourth Circuit had before it the question of the admissibility of a hospital record showing the result of a Bogen's blood test for intoxication. That Court divided three to two and in an opinion by Chief Judge Sobeloff held such test was ad-

missible. It reviewed in detail the conflict in the Circuits. The Court said (p. 359, 360):

> "A divergence in view arises, however, as to whether a record entry of a diagnostic opinion by a doctor or the result of a scientific test which requires expertness to conduct or interpret is admissible under the shop-book rule. Entries of this type, the plaintiff insists, are not covered by the statute. Decisions which lend a measure of support to his argument have been found in the Court of Appeals for the District of Columbia,[4] the Fifth[5] and the Sixth[6] Circuits and in some state courts.[7]

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4. See Polisnik v. United States, 104 U. S. App. D. C. 136, 259 F. 2d 951 (1958) (recorded psychiatric diagnosis held properly excluded); Lyles v. United States, 103 U. S. App. D. C. 22, 254 F. 2d 725 (1957) (same as above); New York Life Ins. Co. v. Taylor, 79 U. S. App. D. C. 66, 147 F. 2d 297 (1945) (same as above). Apparently, however, this court is willing to admit recorded opinion if it is of a type on which doctors do not usually disagree. See Washington Coca-Cola Bottling Works, Inc. v. Tawney, 98 U. S. App. D. C. 151, 233 F. 2d 353 (1956). See also, Wheeler v. United States, 93 U. S. App. D. C. 159, 211 F. 2d 19, 22-23 (1953).

5. See Mullican v. United States, 252 F. 2d 398, 404 (5th Cir. 1958) (diagnosis of patient's mental condition held properly excluded); England v. United States, 174 F. 2d 466 (5th Cir. 1949) (opinion as to sanity based on hearsay held properly excluded). Apparently, the Fifth Circuit will permit introduction of hospital records only to show what treatment the patient received, the cost of services, and the like. See Missouri Pacific R. R. Co. v. Soileau, 265 F. 2d 90, 94 (5th Cir. 1959).

6. See Baltimore & Ohio R. R. v. O'Neill, 211 F. 2d 190 (6th Cir. 1954), (recorded statement as to what X-ray showed held not admissible), reversed on other ground, 348 U. S. 956, 75 S. Ct. 447, 99 L. Ed. 747 (1954). Apparently in this circuit, like the Fifth, the record is admissible only to show administrative matters. See Ranger, Inc. v. Equitable Life Assurance Society of United States, 196 F. 2d 968, 972 (6th Cir. 1952).

7. West v. Fidelity-Baltimore Nat. Bank, 219 Md. 258, 147 A. 2d 859 (1959); Baltimore & Ohio R. R. Co. v. Zapf, 192 Md. 403, 64 A. 2d 139, 6 A. L. R. 2d 400 (1949); Peagler v. Atlantic Coast Line R. R. Co., 234 S. C. 140, 107 S. E. 2d 15 (1959);

"On the other hand, it is the defendant's position that records routinely made of diagnoses and scientific tests which are done in the regular course of a hospital's business, are entitled to admission under a presumption of trustworthiness. Supporting this argument, there are other cases in the District of Columbia,[8] and in the Second,[9] Third,[10] Seventh,[11] Eighth,[12] and

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Travis Life Ins. Co. v. Rodriguez, 326 S. W. 2d 256 (Tex. Civ. App. 1959), affirmed per curiam, 160 Tex. 182, 328 S. W. 2d 434 (1959); Hartman v. Harder, 322 S. W. 2d 555 (Tex. Civ. App. 1959); Liljeblom v. Department of Labor and Industries, 57 Wash. 2d 136, 356 P. 2d 307 (1960); Keller v. Wonn, 140 W. Va. 860, 87 S. E. 2d 453 (1955); Cline v. Evans, 127 W. Va. 113, 31 S. E. 2d 681 (1944).

8. See Wheeler v. United States, 93 U. S. App. D. C. 159, 211 F. 2d 19, 22-23 (1953) (vaginal smear made in usual course of hospital's business held admissible, despite earlier decision excluding psychiatric diagnosis. See footnote 4, supra).

9. See White v. Zutell, 263 F. 2d 613 (2d Cir. 1959) (detailed report of a doctor's medical findings held admissible as a business record); Terrasi v. South Atlantic Lines, 226 F. 2d 823 (2d Cir. 1955) (diagnosis of "fairly pronounced shock" held admissible); Buckminister's Estate v. Com'r, 147 F. 2d 331 (2d Cir. 1944) (diagnosis of cerebral hemorrhage held admissible); Reed v. Order of United Commercial Travelers, 123 F. 2d 252 (2d Cir. 1941) (diagnosis that patient "still apparently well under the influence of alcohol" held admissible). See also, Travelers Ins. Co. v. Childs, 272 F. 2d 855 (2d Cir. 1959) (expressly withholding decision on whether diagnostic opinion is admissible.

10. Bartkoski v. Pittsburgh & Lake Erie R. R. Co., 172 F. 2d 1007 (3d Cir. 1949) (hospital record showing condition of patient held admissible); Norwood v. Great American Indemnity Co., 3 Cir., 146 F. 2d 797 (1944) (autopsy report admissible as a business record).

11. See United States v. Ware, 247 F. 2d 698 (7th Cir. 1957) (record of analysis by government chemist held admissible as a business record). See also, Brucker v. Order of United Commercial Travelers, 217 F. 2d 876 (7th Cir. 1954).

12. See Glawe v. Rulon, 284 F. 2d 495 (8th Cir. 1960) (medical opinion held admissible); Missouri-Kansas-Texas R. R. Co. of Texas v. Ridgway, 191 F. 2d 363, 29 A. L. R. 2d 984 (8th Cir. 1951) (hospital record showing extent of injuries held admissible).

Ninth[13] Circuits, and in state courts,[14] as well as three prior decisions of this court.[15]"

The Court of Appeals for the District of Columbia split five to four in *Lyles v. United States*, 254 F. 2d 725 (C. A. D. C., 1957). There the majority held inadmissible a diagnosis of schizophrenia of the accused which appeared in a hospital record. An unsuccessful attempt was made for certiorari. 78 S. Ct. 997 (1958).

The Fourth Circuit has given this matter en banc consideration and divided three to two in *Thomas v. Hogan*, *supra*, and *Kissinger v. Frankhouser*, 308 F. 2d 348 (C. A. 4, 1962). *Kissinger* made an unsuccessful attempt at certiorari February 18, 1963. 83 S. Ct. 721 (1963).

The case at bar is the latest example of well-founded efforts praying this Court to issue the Writ and announce

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13. See Lew Moon Cheung v. Rogers, 272 F. 2d 354 (9th Cir. 1959) (blood test admissible as business record); Medina v. Erickson, 226 F. 2d 475, 482-83 (9th Cir. 1955) (diagnosis of "bronchogenic carcinoma" and "metastasis of the liver" held admissible).

14. See Bailey v. Tennessee Coal, Iron and R. R. Co., 261 Ala. 526, 75 So. 2d 117 (1954); Nichols v. McCoy, 38 Cal. 2d 447, 240 P. 2d 569 (1952); D'Amato v. Johnston, 140 Conn. 54, 97 A. 2d 893 (1953); Caccamo's Case, 316 Mass. 358, 55 N. E. 2d 681 (1944); Boutang v. Twin City Motor Bus Co., 248 Minn. 240, 80 N. W. 2d 30 (1956); Allen v. St. Louis Public Service Co., 365 Mo. 677, 285 S. W. 2d 663, 55 A. L. R. 2d 1022 (1956); Weis v. Weis, 147 Ohio 416, 72 N. E. 2d 245, 169 A. L. R. 668 (1947); Freedman v. Mutual Life Ins. Co., 342 Pa. 404, 21 A. 2d 81, 135 A. L. R. 1249 (1941); Conlon v. John Hancock Mut. Life Ins. Co., 56 R. I. 88, 183 A. 850 1936); Joseph v. W. H. Groves Latter Day Saints Hospital, 7 Utah 2d 39, 318 P. 2d 330 (1957).

15. Kay v. United States, 255 F. 2d 476 (4th Cir. 1958) (Bogen's test admissible under shop-book rule—alternative ground); Long v. United States, 59 F. 2d 602 (4th Cir. 1932) (diagnostic statement of government doctor in government report held admissible as an exception to the hearsay rule; pre-Shop-Book Act case); United States v. Wescoat, 49 F. 2d 193 (4th Cir. 1931) (same as above).

the scope and meaning of the Federal Business Records Act. Certainly this kind of irreconcilable, widespread, open conflict should be laid to rest now. It must be resolved and we submit in line with the expressed liberal intent of the Congress. With all humility, we submit the time is now ripe for authoritative instruction.

The sharpest conflict regarding the admissibility of certain evidence in these types of reports is found in a comparison between this case and the case of *Pekelis v. Transcontinental & West Air*, 187 F. 2d 122 (C. A. 2, 1951).

In this present case the Court held that any hearsay contained in the report was inadmissible. In so holding the Court rejected the rationale of its own *Moran* case and did not even discuss the specific provision of the statute which provides that conclusions based on hearsay are admissible.

In *Pekelis, supra*, the Second Circuit did not limit the evidence to personal observation of the entrant. In its holding it followed the Third Circuit's *Moran* case and relied upon the specific provision of the statute. It said (pp. 130, 131):

> "It may further be argued that the conclusions in the reports were in part derived not from the personal observation of the entrant, but from information supplied by persons under no business duty to report, and that they were, therefore, not 'made in regular course of any business' within the meaning of the statute. In Moran v. Pittsburgh-Des Moines Steel Co., 183 F. 2d 467, 473, the Court of Appeals for the Third Circuit, per Goodrich, J., in dealing with an accident investigation by the Bureau of Mines of the United States Department of the Interior, held as follows: 'The report is no less admissible because it contains conclusions of experts which are based upon hearsay evidence as well as upon observation. These circumstances, by virtue of express statutory provision, go to weight rather than to admissibility. [28 U. S. C. § 1732 in part:

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility."] Moreover, this Court has several times held that hospital records are admissible under the statute, and certainly medical diagnosis is no less a matter of opinion based upon observation and perhaps hearsay than this report of the Bureau's investigation."

"We agree with this interpretation of the Federal business entries act by Judge Goodrich, see V Wigmore on Evidence (3rd ed.) § 1530a. Nor would the decision of the New York Court of Appeals in Johnson v. Lutz, 253 N. Y. 124, 170 N. E. 517, if we were to adopt its reasoning here, as we perhaps did in United States v. Grayson, 2 Cir., 166 F. 2d 863, 869,[4] call for a different result. In the case at bar most, if not all, of the sources of information were from persons who were under a duty to report to these boards as part of their employment; we include among such persons not only the employees of TWA, but also the employees of the airport and of the Irish Government. If there were any other sources of information, we do not think it would make any difference where expert boards, which appear to have been disinterested, were set up as a matter of business routine to weigh information from all sources and to draw inferences therefrom."

C. The Conflict With This Court.

We submit that the decision is in direct conflict with the decision of this Court in *Palmer v. Hoffman, supra*, which stated that this Act should be "liberally interpreted."

It is clear from *Palmer's* rationale that this canon gives admissibility to reliable, trustworthy business records

4. But cf. Tucker v. Loew's Theatre & Realty Corp., 2 Cir., 149 F. 2d 677, 680.

for *Palmer* says at 63 S. Ct. 480: that this is ". . . a rule designed to facilitate admission of records which experience has shown to be quite trustworthy."

When a record is trustworthy, and otherwise qualifies, it should be admitted. When reliability is absent—as it certainly was in *Palmer*—it should be barred. The record in question here was worthy of trust. The trial judge was singularly qualified to decide that. The Third Circuit is not justified in substituting its view for his in the absence of a clear showing that the trial judge abused his discretion. No such abuse is present nor suggested. The Third Circuit was patently wrong to strip it from the proof of plaintiff's case.

The Second Circuit has recently announced what has long been its interpretation of *Palmer v. Hoffman, supra.* It rejected hearsay as the touchstone for solving Business Records problems and ". . . construed *Palmer v. Hoffman* to give trial judges discretion to determine whether the circumstances surrounding accident reports made by others justify their acceptance in evidence." *Puggioni v. Luckenbach Steamship Company,* 286 F. 2d 340, 343-344 (C. A. 2, 1961).

The Third Circuit here did not concede the trial judge any such discretion. Instead, it held that the evidence was hearsay and concluded without more that that ended the matter.

It was wrong of the Third Circuit to determine this Business Records problem on the basis of hearsay. *Puggioni* was right to reject such a rationale. It was wrong of the Third Circuit to deprive the trial judge of an important function uniquely his. It was right of *Puggioni* to honor that role. It was wrong of the Third Circuit to pay no heed to the concept of trustworthiness. It was right of *Puggioni* to respect it.

Puggioni has shown the way. It is now propitious that this Court endorse such a rationale as authoritative.

CONCLUSION

After unremitting preparation and exhaustive presentation of her case plaintiff overwhelmingly carried her burden of proving that defendant's wilful misconduct caused her husband's death in an air catastrophe. Against plaintiff's convincing proof that the defendant was not entitled to the immunizing cloak of the Warsaw Convention, defendant offered no resistance save its repeated assertion that the burden of proving a case which attaches liability in an air crash such as this is virtually impossible to carry. While defendant was entitled to such hope, the jury which heard this case was clearly entitled to its finding that plaintiff did carry her burden of proving defendant's wilful misconduct and that such wilful misconduct was a deliberate "sneak-in" to Imerson Airport.

While insisting that the plaintiff could not carry her burden, defendant had no reluctance in its own case in utilizing virtually the same hypothetical question which contained the evidence which forms the basis for this Petition. Between this decision and the denial of our Petition for Rehearing, the Third Circuit decided a case which held such behavior to be acquiescence in the error complained of. We called the Third Circuit's attention to the legal principle involved, but to no avail. Why such acquiescence should be found in some Third Circuit cases but not in this was never explained by that Court. As to this the dissenting opinion below stated:

> "Assuming arguendo that the data based on Schmidt's calculations was inadmissible as 'hearsay' and was thus erroneously permitted by the trial court to be used as the premise of a hypothetical question put to plaintiff's experts designed to elicit their opinions as to whether the plane crash was due to wilful misconduct on the part of its pilot, the defendant 'cannot now be heard to complain' since it 'acquiesced' in the erro-

neous admission when it put virtually the identical hypothetical question to its own experts. We have just so held in Roberts v. United States et al., and Union Carbide Corporation, et al., F. 2d, (pp. 3, 4), (decided April 18, 1963), citing Spears v. Atchison, Topeka & Santa Fe Ry. Co., 255 F. 2d 780, 784 (7 Cir. 1958). (12c-13c)

This case was tried by a most experienced trial judge who managed the entire litigation with an even-hand, a noteworthy understanding of and respect for the technical demands of the applicable law, and by a judge who made a studied and eminently justified decision to have the jury return answers to distinct interrogatories bearing on the separate issues of wilful misconduct and damages. His reason for taking a verdict in that form is a classic example of sorely needed conservation of the resources of courts and litigants.

If a new trial had to be granted here (a decision that was reached for reasons which we urge justify the issuance of the writ), it is incomprehensible why that new trial should not be limited to the issue of liability only. Although the Third Circuit held in its initial opinion that the only reversible error bore on the issue now the subject of this Petition, it nevertheless granted an entire trial rather than order a retrial of liability only. The alleged error could not possibly have had any effect on damages. We pointed this out in our Petition for Rehearing. The dissent agreed with us. The Third Circuit has never justified its conclusion that a new trial should not be so limited.

This Court has the power to rectify that error of the Third Circuit and, we respectfully submit, it should do so as the minimum relief to be granted here. 28 U. S. C. § 2106 provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand

the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. June 25, 1958, c. 646, 62 Stat. 963."

With all its technical complexity, the case was ultimately simple to grasp, and there can be no question that having had it fairly presented to them, the jury was convinced of its compelling character and rightly decided it. What happened to it on appeal has undone all of that, and undone it in a manner which leaves unanswered the questions raised by the dissent. As disturbing as are the above considerations of defendant's acquiescence in the supposed error, and the Third Circuit's refusal to recognize the obvious appropriateness of a limited new trial, the core of this Petition raises questions of a larger and more sweeping nature. We earnestly submit that this case is a remarkably appropriate subject for the grant of the Writ.

(1) An appellate court took from a litigant what only a jury can give under the Seventh Amendment: the resolution of a disputed issue of fact.

(2) The trial judge was deprived of his fundamental right to make a finding on a preliminary question of fact, a deprivation which raises the most serious questions about the role of the trial judge—and appellate courts—in federal litigation.

(3) Perhaps the most heavily used and uniquely valued statute in federal trial practice has now been construed and applied in a manner which has caused conflict within and without the Third Circuit and which renders impossible reasonably uniform application of the statute through our federal courts in increasingly significant air disaster cases such as this as well as in all other types of litigation. Other circuits have spoken decisionally of the difficulties in applying the statute consistently. We submit that the time is

now ripe for the authority of instruction which only this Honorable Court can give.

The Writ should issue.

Respectfully submitted,

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Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,060

MARION J. BERGUIDO, INDIVIDUALLY, MARION J. BERGUIDO, ROBERT G. ROWE AND WARREN H. WOODRING, EXECUTORS OF THE ESTATE OF CARLOS BERGUIDO, JR., AND JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO AND CARLOS BERGUIDO, 3D, BY THEIR GUARDIAN, MARION J. BERGUIDO

v.

EASTERN AIR LINES, INCORPORATED,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued November 23, 1962

Before BIGGS, *Chief Judge*, and MCLAUGHLIN, *Circuit Judge*, and SHERIDAN, *District Judge*.

OPINION OF THE COURT

(Filed March 25, 1963)

By MCLAUGHLIN, *Circuit Judge*.

This is a wrongful death action brought, individually and as executors of the estate of the deceased, Carlos Berguido, Jr., against Eastern Air Lines. Decedent was a passenger for hire on an Eastern Constellation that crashed near Imeson Airport, Jacksonville, Florida in the early morning hours of December 21, 1955.

In giving the case to the jury, the trial court ruled that the rights of the parties were governed by the treaty known as the "Warsaw Convention", 49 Stat. 3,000 (1929), which applies to flights in "international transportation."[1] The Warsaw Convention provides, inter alia, that the carrier is absolutely liable for all injuries where the accident causing the damage so sustained takes place on board the aircraft. Article 17. In such circumstances the liability of the carrier for each passenger is limited to 125,000 francs (approximately $8,300). Article 22(1). In order to escape that liability, the carrier has the burden of proving that it has taken all necessary measures to avoid the damage or that it was impossible for it to take them. Article 20(1). On the other hand, if the plaintiff sustains his burden of proving that the damage is caused by the "wilful misconduct" of the carrier, "the carrier shall not be entitled to avail himself of the provisions of this convention which exclude [Art. 20(1)] or limit [22(1)] his liability." Article 25(1). It is within the framework of that latter portion of the treaty that the problems before us arise.

The jury found that the crash was the result of one or more acts of wilful misconduct on the part of defendant and entered a verdict for plaintiff in excess of the Convention limitation. Defendant's appropriate post-trial motions were denied and appeal followed.

This was a thoroughly and exhaustively prepared case, made all the more difficult by the fact that there were no survivors to the crash and the damage to the plane was severe. Simply stated, plaintiff's theory was that, due to the steadily increasing weather deterioration in the airport vicinity, the crew of Eastern's flight came in at an excessive rate of speed, attempting to land before the airport closed down. In so doing, the pilot also executed a "sneak-

1. The cause, as submitted, was also restricted to the right of decedent's widow to claim recovery under the Florida Wrongful Death Act. Fla. Stat. Ann. §§ 768.01, 768.02 (1958 Supp.). And see Citrola v. Eastern Air Lines, Inc., 264 F. 2d 815 (2 Cir. 1959).

in" pattern by which he deliberately flew below his glide slope and authorized minimum[2] and ducked under the overcast in order to "take a look". This alleged deliberate behavior was claimed to have been the cause of the aircraft's crash into the wooded area about three fourths of a mile from the end of the runway with its tragic consequences.

The key to plaintiff's theory lay in the testimony of her two expert witnesses, Glickstein and Cann. They were permitted to testify, over objection, to the significance of certain facts which were propounded to them in a hypothetical question, and from which they tendered conclusions and opinions as to behavioral character of the flight's pilot.[3] The crucial assumed facts in these hypotheticals were that (1) the speed of the plane at the time of impact was 140 knots per hour; (2) during the last 200 feet of the flight path its angle of descent was $2\frac{1}{2}$ degrees at a rate of 10 feet per

---

2. The evidence indicates that the pilot was making an Instrument Landing System (ILS) Approach to the runway. A component of this system is the glide slope, which is, essentially, a radio beam that gives slope control—elevation control—at a pre-set angle of approach to the end of the runway and indicates to the pilot whether or not he is at the correct elevation as he comes in for his approach. At the time of the accident, the angle of approach on this specific approach was $2\frac{1}{2}$ degrees.

"Minimums" refer to the weather minimums—required ceiling and visibility—prescribed by the then Civil Aeronautics Administration. The minimums for an aircraft of this type on an ILS approach were 200 foot ceiling and ½ mile visibility. If the pilot has reached the 200 foot level and does not have visual reference to the ground he must execute a missed approach. When the approach is visual the ceiling is 400 feet and visibility ¾ of a mile. It is undisputed that the plane was below both the 200 foot minimum (assuming an instrument approach) and 400 foot visual minimum (assuming a visual approach). Thus, the crux of the case is how and/or why the aircraft got below both the glide slope and the legal minimum.

3. In particular, they testified to the effect that "the pilot took a calculated risk and deliberately flew the aircraft below the glide slope during his ILS approach," App. for Defendant, p. 289a, and he also "did intentionally f * * * below his legal minimums", App. for Defendant, p. 349a. See also pp. 290a and 347a.

second; (3) just prior to impact the attitude[4] of the aircraft was 11½ degrees right bank and (4) the plane was in a 4¾ degree nose-up position. These figures were the foundation upon which plaintiff's expert witnesses constructed their opinions as to whether or not the pilot intentionally flew below the glide slope and the authorized minimum. For example, Glickstein testified that the assumed fact that the plane was proceeding inbound from the outer marker at an angle of descent of 2½ degrees at 10 feet per second "lea is me to the inescapable conclusion that the aircraft was under the absolute control of the crew * * *". The figures of 11½ degrees right bank and 4¾ nose-up angle "were very significant" in indicating that "after the pilot had gotten himself into the position where it was too late, he was now desparately trying to get back on his localizer indicator."[5]

It is readily apparent that the admission of the above data was extremely prejudicial to the defense. Defendant contends that it is just as apparent that these figures were inadmissible.

They were put into evidence by the testimony of Van Epps and Searle, the chairmen, respectively, of the Operations and Structures Committees of the Civil Aeronauties Board (CAB) team that investigated the crash. Following the policy suggested in Universal Airline v. Eastern Airlines, 188 F. 2d 993 (D. C. Cir. 1951) and encouraged by the CAB the depositions of the two men were taken, with all objections, except as to form, being reserved until the trial. At the trial portions of Van Epps' deposition were read, in which he gave all of the above figures but those concern-

4. "Attitude" refers to "whether the plane was in a dive or climb, banking, or turning to the right or left, or climbing or banking and diving or banking." App. for Defendant, p. 238a. The assumed attitude of 11½ degrees right bank and 4¾ degrees nose-up refers to the fact that the plane, just prior to impact, was in a slight turn to the right and banked 11½ degrees with the nose-up 4¾ degrees from the plane's line of motion.

5. App. for Defendant, pp. 309a, 310a. See also pp. 349-52.

ing the angle and rate of descent. The record indicates that in stating the figures Van Epps was reading from the summary report submitted by Searle (as head of the Structures Committee), thus "refreshing his recollection" and then testifying as to what the figures were. However, the record is also clear that evidentially Van Epps was only refreshing his recollection as to the things he personally observed at the scene of the crash—the propeller slash marks through the trees, and impact marks on the turf and trees. In the sense of recalling what he had previously read from Searle's report he also refreshed his recollection as to the figures in that report. He, himself, had made none of the computations: They were the direct responsibility of Searle, as chairman of the Structures Committee, and were determined by a man working under Searle.

The reading of Searle's deposition at the trial again introduced these computations, including those relating to the angle and rate of descent. However, on cross-examination defendant brought out that the calculations had been done by one Schmidt, a Lockheed aeronautical engineer working under Searle's supervision. It is this fact which brings into focus the basic area of conflict between the parties.

Defendant urges that this testimony is barred by the prohibition of Section 1441(e) of the Civil Aeronautics Act, 49 U. S. C. 1301-1542 (Supp. 1962), which provides, in pertinent part, that "no part of any report or reports of the Board relating to any accident or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports." The judicial interpretation of this section has not been too extensive or precise.[6] Defendant places primary reliance on Lobel v. American Airlines, 192 F. 2d 217 (2 Cir. 1951). It argues that Lobel establishes the rule that Section 1441(e) prohibits a CAB investi-

6. For a summary of the cases construing this provision see Israel v. United States, 247 F. 2d 426, 429 fn. 2 (2 Cir. 1957).

gator, such as Searle, from testifying to anything except his personal observations about the scene of the crash and the condition of the plane after the accident. Thus, since Searle had no first hand knowledge of the above facts to which he testified the section bars the use of such testimony at trial.

This argument blurs the essential policy and reason behind the section with other policies affecting the admissibility of evidence. The fundamental policy underlying 1441(e) appears to be a compromise between the interests of those who would adopt a policy of absolute privilege in order to secure full and frank disclosure as to the probable cause and thus help prevent future accidents and the countervailing policy of making available all accident information to litigants in a civil suit.[7] Accordingly, the primary thrust of the provision is to exclude CAB reports which express agency views as to the probable cause of the accident. Of necessity, the opinion testimony of the CAB's investigators would also come within this rule.[8] However, the testimony of Searle as to the calculations made by Schmidt certainly does not come within the ambit of the privilege. His was not evaluation or opinion testimony, for it reflects in no way the CAB's findings as to the probable cause of the crash.

The fact that this evidence is not barred by Section 1441(e) is not conclusive of the question, however, for it does not consider whether the testimony might otherwise be inadmissible under the rules of evidence. Defendant would have it that Searle's testimony based upon Schmidt's findings is hearsay and inadmissible. On the other hand, plaintiff argues with great vigor that "Schmidt's only function was to provide the mathematics" and "the simple

7. See Simpson, Use of Aircraft Accident Investigation Information in Actions for Damages, 17 J. Air L. & Com. 283 (1950).

8. The CAB has so interpreted Section 1441(e). See, Introductory Statement of counsel for the CAB, Van Epps deposition, p. 3. And see Israel v. United States, supra.

operation of mathematics as performed by Schmidt clearly does not make this testimony either hearsay or opinion" as defendant would contend. A careful reading of Searle's deposition convinces us that the work done by Schmidt was much more than a mere "simple operation of mathematics." Although the actual mathematical calculations might, in themselves, have been "simple", the cross-examination of Searle and the later testimony of defendant's expert witness, La Vake, make it plain that Schmidt had to make certain assumptions and choices relative to the physical facts found at the crash scene before he could reach the final computation stage. Furthermore, the testimony of Searle indicates that he had no knowledge of how Schmidt arrived at his final figures and what assumptions were made in the process. The inherent vice of all hearsay evidence so becomes apparent, for, at the very least, defendant had no opportunity to cross-examine Schmidt and ascertain from him the basis of his computations; to test the validity of said basis, including whatever assumptions he made, if any, and what he did regarding the information available to him; to ascertain his method of computation and to test its validity, etc. For this reason we hold that it was prejudicial error to admit the evidence at the trial.

Plaintiff urges that even though we might find such testimony of Searle to be hearsay it is still admissible, for Searle's committee report, which contains the same information, is acceptable under the Federal Business Records Act, 28 U. S. C. § 1732 (Supp. 1962), as part of a routine business record. Initially, we note that the report itself was not in evidence nor was it suggested as a reason for the admission of the evidence.[9] More fundamentally, this is not the same situation as that presented to us in Moran v. Pittsburgh-Des Moines Steel Co., 183 F. 2d 467 (3 Cir. 1950), the decision upon which plaintiff relies.

9. Cf. Gordon v. Robinson, 210 F. 2d 192, 196 (3 Cir. 1954).

In Moran we were not faced with a statutory provision that revealed a congressional policy to bar the use in litigation of the accident reports of the Bureau of Mines. That is the fact here, however, with respect to the reports of the CAB and to admit these reports for the reason plaintiff names would be to ignore explicit congressional policy,[10] which we decline to do. In passing, it might be noted that the particular holding in Moran would seem to be of doubtful value on the precise issue with which we are concerned in light of our later ruling in Gordon v. Robinson, supra, note 9.

We have carefully studied the other points advanced on behalf of the defendant. We do not consider that any of them involves reversible error. In view of our above dispositive holding there is no need of examining those points in detail.

The judgment of the district court will be reversed and the case remanded for a new trial.

Biggs, *Chief Judge*, concurring.

I concur in the result reached by the majority opinion and in large part with the views expressed in it. I am convinced, however, that not only was that portion of Searle's testimony which was based in substantial part on Schmidt's computations, inadmissible as hearsay, but also an important part of Van Epps' testimony, that portion based on Searle's report filed with the CAB, was inadmissible as hearsay too. The admission of the evidence referred to was substantially prejudicial.

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10. Cf. Palmer v. Hoffman, 318 U. S. 109, 115 (1942).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,060

MARION J. BERGUIDO, INDIVIDUALLY; MARION J. BERGUIDO, ROBERT G. ROWE AND WARREN H. WOODRING, EXECUTORS OF THE ESTATE OF CARLOS BERGUIDO, JR.; AND JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO AND CARLOS BERGUIDO, 3D, BY THEIR GUARDIAN, MARION J. BERGUIDO

v.

EASTERN AIR LINES, INCORPORATED,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, *Chief Judge;* and MCLAUGHLIN, *Circuit Judge;* and SHERIDAN, *District Judge.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the case remanded for a new trial. Costs to appellant.

Attest:

IDA O. CRESKOFF,
Clerk.

March 25, 1963.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,060

MARION J. BERGUIDO, INDIVIDUALLY; MARION J. BERGUIDO, ROBERT G. ROWE AND WARREN H. WOODRING, EXECUTORS OF THE ESTATE OF CARLOS BERGUIDO, JR., AND JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO AND CARLOS BERGUIDO, 3D, BY THEIR GUARDIAN, MARION J. BERGUIDO

v.

EASTERN AIR LINES, INCORPORATED,
Appellant

OPINION ON PETITION FOR REHEARING.

(Filed May 28, 1963)

Present: BIGGS, *Chief Judge*, and MCLAUGHLIN, KALODNER, STALEY, HASTIE and SMITH, *Circuit Judges*.

PER CURIAM.

In our original opinion in this case we reversed the judgment of the district court and remanded the case for a new trial for the reason that prejudicial hearsay testimony was erroneously admitted into evidence at the trial. Upon careful reconsideration of the record and the petition for rehearing we adhere to our original view.

The initial points raised by the dissent to this petition are a repetition of plaintiff's position before us on the original appeal, are based on a restrictive reading of the record and are fully covered in the court opinion. Similarly, reliance on our recent opinion in Roberts v. Union Carbide Corp., F. 2d (April 18, 1963) is clearly misplaced, for

(1) that case is distinguishable on both its facts and decisional basis, and (2) defendant's repeated objections throughout the course of the trial and in its post-trial motions to the admission of this evidence form no basis for a rationale that it "acquiesced" in the erroneous admission.

Petitioner's request for a partial new trial limited to the liability issue is properly denied. See Rolner v. Baldwin, F. 2d (3 Cir. May 7, 1963); Thompson v. Camp, 167 F. 2d 733, 734 (6 Cir.), cert. denied 335 U. S. 824 (1948).

The petition for rehearing will be denied.

KALODNER, *Circuit Judge*, dissenting.

I would grant the petition for rehearing for these reasons:

First: The court en banc should consider and decide the primary critical issue of first impression at the appellate level whether testimony of a chairman of a Civil Aeronautics Board (CAB) investigating team, based on his official report to the CAB of an airplane accident investigation is inadmissible as "hearsay" to the extent that it embraces factual data and mathematical calculations premised thereon, assembled by him or under his direct supervision by a team member, which he has "checked" and found "to be true". I hold to the view that such evidence is not "hearsay".

Second: The record does not sustain this Court's factual determination that "Schmidt [a member of the CAB team] had to make certain *assumptions* and choices relative to the physical facts found at the crash scene before he could reach the final computation stage", and that "Furthermore, the testimony of Searle [chairman of the CAB team] indicates that he had no knowledge of how Schmidt arrived at his final figures and what *assumptions* were made

in the process." The trial record affirmatively establishes that Searle testified in his deposition that he had supplied to Schmidt the factual physical data which formed the premise of Schmidt's mathematical calculations; thereafter, he "checked" the contents of his summary report which included the physical data and calculations and found them "to be true"; all the facts stated in his report were based solely on the evidence assembled in the accident investigation by him or members of his team under his direct supervision; and, *that as far as he knew Schmidt had not made any "assumptions"* in making his calculations. With reference to the foregoing it appears that our determination that Schmidt had made "assumptions" rested on the opinion expressed by LaVake, defendant's expert, that he must have done so. On this score, it must be noted that the trial judge had specifically—and correctly so—instructed the jury that it was its duty "to determine" whether the hypothetical questions put to all the experts "have any assumptions that were not established by the evidence." The jury's verdict in favor of the plaintiff establishes that the evidence was not based on "assumptions" and in making a contrary determination we usurped the jury's function of choosing between Searle's testimony that no assumptions had been made and LaVake's *estimate* to the contrary. In doing so we disregarded the Seventh Amendment of the Constitution.

Third: Assuming arguendo that the data based on Schmidt's calculations was inadmissible as "hearsay" and was thus erroneously permitted by the trial court to be used as the premise of a hypothetical question put to plaintiff's experts designed to elicit their opinions as to whether the plane crash was due to wilful misconduct on the part of its pilot, the defendant "cannot now be heard to complain" since it "acquiesced" in the erroneous admission when it put virtually the identical hypothetical question to its own experts. We have just so held in Roberts v. United States et al. and Union Carbide Corporation, et al.,

F. 2d , (decided April 18, 1963), citing Spears v. Atchison, Topeka & Santa Fe Ry. Co., 255 F. 2d 780, 784 (7 Cir. 1958).

Finally, I would limit a new trial to the issue of liability in view of the court's expressed views with respect to the points raised on the appeal by the defendant on the issue of damages.

The issues of liability and damages had been submitted to the jury in the instant case in separate interrogatories with the approval of the parties, and the jury had been fully instructed by the trial judge that the issues of liability and damages were independent of one another. This Court has in the past limited the trial of issues upon remand under the authority of 28 U. S. C. A. § 2106. Rosa v. City of Chester, Pa., 278 F. 2d 876 (1960); United States v. Calvey, 110 F. 2d 327 (1940). To the same effect see Calaf v. Fernandez, 239 F. 795 (1 Cir. 1917) and Judge Hastie's excellent discussion in the recent case of Romer et al. v. Baldwin, et al. decided May 7, 1963.

Judge Hastie, while not joining in this opinion, would also grant the petition for rehearing.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 14,060.

MARION J. BERGUIDO, INDIVIDUALLY; MARION J. BERGUIDO, ROBERT G. ROWE AND WARREN H. WOODRING, EXECUTORS OF THE ESTATE OF CARLOS BERGUIDO, JR.; AND JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO AND CARLOS BERGUIDO, 3D, BY THEIR GUARDIAN, MARION J. BERGUIDO

v.

EASTERN AIR LINES, INC.,

Appellant.

ORDER SUR PETITION FOR REHEARING.

Present: BIGGS, *Chief Judge*, and MCLAUGHLIN, KALODNER, STALEY, HASTIE and SMITH, *Circuit Judges*.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

Attest: IDA O. CRESKOFF, *Clerk*.

Dated: May 28, 1963.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 349

MARION J. BERGUIDO, individually, MARION J. BERGUIDO, ROBERT G. ROWE and WARREN H. WOODRING, Executors of the Estate of CARLOS BERGUIDO, JR., and JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO and CARLOS BERGUIDO, III, by their Guardian, MARION J. BERGUIDO,

Petitioners,

vs.

EASTERN AIRLINES, INCORPORATED,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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5 Wigmore, Evidence (3rd Ed., 1940):

Sec. 1362 ..... 6fn

Counter-Statement of Question Presented

Should the Supreme Court grant a writ of certiorari to review a decision by the Court of Appeals for the Third Circuit that a judge in the District Court for the Eastern District of Pennsylvania improperly admitted into evidence certain prejudicial hearsay testimony?

I

Counter-Statement of the Case

The petitioner, the plaintiff and appellee below, requests a writ of certiorari for Supreme Court review of a decision by the Court of Appeals for the Third Circuit reversing a judgment on a verdict in her favor in a wrongful death action in the District Court for the Eastern District of Pennsylvania. The reversal was on the ground that the trial judge had improperly admitted into evidence prejudicial hearsay testimony. The petitioner urges that the Court of Appeals erred and thereby generated momentous legal questions which the Supreme Court should resolve. The respondent contends that no basis whatsoever exists for the issuance of the writ of certiorari, for not only was the Court of Appeals decision clearly correct, but moreover, since it involved only a routine question of hearsay evidence, it does not embrace an issue warranting or deserving of the attention of the Supreme Court. *Rice v. Sioux City Cemetery*, 349 U. S. 70 (1955).[2]

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[1] Throughout this brief, references to the record will be as follows:

Pages in the petition for writ of certiorari itself will be designated by page number—(page ..).

Pages in the appendix to the petition for writ of certiorari will be designated by the number of the page and the letter "c"—(..c).

Pages in the appendix filed by respondent with the Court of Appeals will be designated by the number of the page and the letter "a"—(..a).

[2] In the above case, the Court cited with approval *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U. S. 387 (1923), and quoted (349 U. S. 79) the following pertinent passage therefrom (261 U. S. 393):

"If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have

(Continued on following page)

In urging that the Court of Appeals (per Judges Biggs, McLaughlin and Sherman) erred, petitioner argues that, far from there being a simple matter of hearsay evidence involved, the appellate determination jeopardizes vast areas of the Federal system of jurisprudence. Consonant with this gloomy—and unfounded—forecast, petitioner, with an obvious bow to pronouncements on what will excite the attention of the Supreme Court, artificially formulates two reasons why a writ of certiorari should issue: first, that the Court of Appeals arbitrarily and without justification usurped the function of trial judge and jury, and second, that its decision has precipitated conflict between the circuits in the interpretation of Federal legislation.

Respondent will show that the first reason advanced, even if (as contended by petitioner) it were worthy of review by the Supreme Court, is founded upon wanton distortions of the record, proceeds from specious argument, and merits no consideration in the face of the carefully considered opinion of the Court of Appeals which petitioner has so recklessly assailed.

(Continued from preceding page)

enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

On petition for rehearing below, Chief Judge Biggs and Judges McLaughlin, Staley and Smith (Judges Kalodner and Hastie dissenting) stated in a *per curiam* opinion (10a):

"Upon careful reconsideration of the record and the petition for rehearing we adhere to our original view."

Judge Kalodner's dissent (in which Judge Hastie did not join) was apparently induced by the petitioner's manner of presenting the record. In this connection, see footnote 5, *infra*.

The second reason proposed by petitioner as justifying certiorari, that relating to inter-circuit conflict on legislative interpretation, is an even weaker reed for petitioner to lean upon under the circumstances of this case, for, as respondent will show, it is a clearly synthetic issue, completely extraneous to the case, and nothing which has occurred in this case to date has created any conflict between circuits in the interpretation of Federal legislation.

Only a brief analysis is required to demonstrate the poverty of petitioner's position. The few additional facts necessary to understand the issue are set forth in the argument below.

II

ARGUMENT

The Petition is Without Merit

Suit arose out of an airplane accident, allegedly due to pilot error. All seventeen persons on board, including the crew and the petitioner's decedent, were killed and the airplane was largely destroyed by fire and impact. The trial judge held that petitioner's wrongful death action was governed by the Warsaw Convention (49 Stat. 3000). To exceed the amount of the recovery provided by Article 22(1) of said Convention, petitioner sought to prove "wilful misconduct" on the part of respondent's pilots by producing at the trial two experts (Glickstein and Cann) who were permitted by the trial judge to supply opinion testimony on the state of mind of said pilots.

The Court of Appeals recognized that the aforesaid expert opinion, which was the predicate of the alleged "wilful misconduct," rested, in turn, solely and exclusively upon certain critical facts, or more accurately, figures, presented in hypothetical questions relating to the airplane's speed, rate and angle of descent, angle of bank and longitudinal attitude, stating (4c):

"These figures were the foundation upon which plaintiff's expert witnesses constructed their opinions as to whether or not the pilot intentionally flew below the glide slope and the authorized minimum."

It was these figures which the Court of Appeals held were improperly admitted into evidence and should have been excluded as hearsay.

The foregoing figures had come into evidence through the testimony of one Searle, an investigator of the Civil Aeronautics Board (hereinafter C.A.B.). However, these figures were not Searle's but rather had evolved from work done by one Carl Schmidt, an aeronautical engineer to whom this work had been specifically assigned. Schmidt was never called as a witness, and respondent was never able to test the validity of his computations because Searle was unable to state of his own knowledge what Schmidt did or how he did it, including of course, whether or not Schmidt made any assumptions.

Specifically, on cross-examination Searle testified (253a and 254a):

"Q. What I want to ask and what I want to get straightened out is: In your report, are these conclusion facts, 140 knots, descent, and so on, you said you did not determine these yourself.

Is that true you did not calculate them?

A. That is correct.

Q. Who calculated them?

A. Mr. Carl Schmidt.

Q. Then the results were given to you?

A. Right.

Q. Do you know, of your own knowledge, whether Mr. Schmidt made any assumption of any kind in determining—in coming to these conclusions you have here?

The Witness: No, sir.

Q. Do you know how Mr. Schmidt did this or what computations he used in arriving at these figures?

A. No, sir; I did not.'"[4]

Petitioner nevertheless argues that the Court of Appeals usurped the functions of trial judge and jury in determining that Searle's testimony about Schmidt's work was inadmissable hearsay, and contends that Searle "personally verified" Schmidt's calculations, basing that contention on an allegedly "fair inference" from selected dictionary definitions of the word "checked" (page 16). In so contending, petitioner flies in the face of Searle's candid and explicit testimony to the contrary. Respondent cannot comprehend how, in view of such unambiguous testimony on the point by Searle, not to mention the fact that Schmidt was technically trained as an aeronautical engineer, petitioner can argue that Searle either did or was in any position to have "personally verified" Schmidt's calculations. The record is unequivocally to the contrary.

An even more serious misrepresentation of the record may be found in petitioner's apparent contention that Searle testified that Schmidt made no assumptions in making his computations (page 17), a contention petitioner makes in urging that the Court of Appeals had weighed the credibility of Searle and La Vake and had rejected Searle's testimony in favor of La Vake's, thereby usurping the

[4] In light of the above testimony, it is readily apparent that when Searle introduced Schmidt's figures into evidence, without further knowledge about the subject upon which he could be cross-examined, a most elementary example of inadmissible hearsay arose for consideration by the Court of Appeals. Thus, as stated in 5 WIGMORE, EVIDENCE, §1362 (3d ed. 1940):

"It is here sufficient to note that the Hearsay rule, as accepted in our law, signifies *a rule rejecting assertions, offered testimonially, which have not been in some way subjected to the test of cross-examination.*" (Emphasis by author.)

jury's function and depriving petitioner of a jury trial as guaranteed by the Seventh Amendment (pages 19 and 20). The record (as previously quoted on pages 5 and 6 in context and without the petitioner's ambiguous paraphrasing thereof) shows that Searle testified that he *did not know what* Schmidt did or *how* he did it, and that simply *one* of the things he did not know was whether Schmidt made any assumptions. Petitioner's tactic (page 17), in seeking to wrench support from this testimony, is obvious. It is to twist a negative answer—a disclaimer of knowledge—into authority for an affirmative proposition, and then to complain about the refusal of the Court of Appeals to accept the distortion.[*] Moreover, since Searle was silent on the point, it follows that La Vake could not have contradicted him, as petitioner suggests in the petition (pages 20 and 21).[*] The contradiction exists only in petitioner's argument, not in the record.

Respondent has not analyzed herein the authorities cited by the petitioner in part I of the petition because their applicability, quite obviously, depends on the validity of petitioner's factual premises. As shown above, the record conclusively rejects and invalidates those premises and the arguments based thereon, and the authorities, therefore, have no bearing on this case.

[*] Parenthetically, in view of the total absence of contradictory testimony in the record which could be contrasted and compared, petitioner's strategy on this point is to strongly suggest a contradiction (pages 19 and 20) and then to shift over to Judge KALODNER's dissent on the petition for rehearing to supply a direct statement that there was a contradiction (page 21). The record, as noted, is otherwise. In addition to revealing petitioner's devious approach, the argument on this point also illustrates that Judge KALODNER, unfortunately, who was not a member of the original panel, apparently was induced to misconceive what is in the record.

The argument in part II of the petition may be dispatched summarily: it is a transparent attempt to induce the Court to grant certiorari on the basis of alleged conflicts arising out of an irrelevant statute, the Federal Business Records Act (62 STAT. 945, 28 U. S. C. §1732 (1948)).

The gist of petitioner's argument appears to be that if oral C.A.B. testimony is not barred by 72 Stat. 781, 49 U. S. C. §1441(e) (1958),[6] it then becomes automatically admissible under the Business Records Act. This conclusion, as the Court of Appeals quickly noted (6e), is a *non sequitur*. The Court also observed (7e) that "the report itself was not in evidence nor was it suggested as a reason for the admission of the evidence." We might add, of course, that any attempt to introduce the report into evidence would have been precluded by 49 U. S. C. §1441(e). Moreover, accepting petitioner's argument would lead to the curious result of *oral testimony*, based on a record which is itself barred from evidence under a specific statute governing such *records*, being admitted under still another statute relating only to *records*, but without so much as a solitary record of any kind ever having been offered in evidence. The argument rejects itself. Without exhausting the chaotic possibilities inherent in petitioner's argument, we note in conclusion, as did the Court below (8e), that it would also circumvent 49 U. S. C. §1441(e). Petitioner, obviously well aware of the problems the argument would trigger with respect to both of the statutes under discus-

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[6] Entitled "Use of records and reports as evidence", and referring to the records and reports of the C.A.B., the text of 49 U.S.C. §1441(e) reads:

"No part of any report or reports of the Board relating to any accident or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports."

sion, makes no attempt to reconcile them in light of the argument in part II of the petition.[7]

III

CONCLUSION

The petitioner, recognizing that the Supreme Court ordinarily will not grant a writ of certiorari merely to review questions of an evidentiary nature,[8] much less the particular one here involved, has disguised the simple hearsay question decided below in two lengthy but patently unsound arguments. The first is based upon specious arguments pieced together from blatant distortions of the record. The second is even more synthetic and contrived. The record, even on casual inspection, rejects the peti-

[7] While the cases cited in part II of the petition are as irrelevant as those cited in part I, taken as a whole they are a further illustration of the spurious nature of petitioner's argument. Without squandering the time and space which would be entailed in a case by case review, we rely on the succinct disposition by the Court below of *Mason* v. *Pittsburgh Des Moines Steel Co.*, 183 F. 2d 467 (3 Cir. 1950) and request the Court to observe that despite the mass of cases cited, only *one* concerned an airplane accident (*Pekelis* v. *Transcontinental & West Air*, 187 F. 2d 122 (2 Cir. 1951)), and it involved neither C.A.B. testimony nor a C.A.B. report. In short, the cases in part II cut in precisely the opposite direction from that intended by the petitioner.

[8] See for example, *General Pictures Corp.* v. *Electric Co.*, 304 U. S. 175, 178 (1938), noting on petition for certiorari that "Granting of the writ would not be warranted merely to review the evidence or draw inferences from it", *Southern Power Co.* v. *Public Service Co.*, 263 U. S. 508, 509 (1924), dismissing a writ of certiorari as improvidently granted on mistaken impression that a question of public importance was involved rather than a mere question of fact arising out of petitioner's particular case, and *Houston Oil Co. of Texas* v. *Goodrich*, 245 U. S. 440, 441 (1917), stating that the Court does not review questions depending "essentially on an appreciation of the evidence."

tioner's attempt to transform a simple and clearly correct decision by the Court of Appeals into a complex case of land mark proportions.

Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1963.

No. 349.

MARION J. BERGUIDO, individually, MARION J. BERGUIDO, ROBERT G. ROWE and WARREN H. WOODRING, Executors of the Estate of CARLOS BERGUIDO, JR., and JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO and CARLOS BERGUIDO, 3d, by their Guardian, MARION J. BERGUIDO,

Petitioners,

v.

EASTERN AIRLINES, INCORPORATED,

Respondent.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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OCTOBER TERM, 1963.

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PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

INTRODUCTION.

Respondent has impugned the motives of petitioners' counsel. It has suggested that a member of the Court of Appeals was "induced" into a dissent. It has misquoted the trial record.

Respondent's brief frustrates the search for truth which adversary proceedings are supposed to be. It is also a profound demonstration of just how meritorious this Petition is. The magnitude of the irresponsibility of respondent's brief is a revealing measure of the dimensions of the issues it has tried to disguise.

Unlike the respondent, we have presented a thorough and accurate discussion devoted strictly to the facts and law. We did so in our Petition.

While we do not believe that this Court will be diverted by respondent's intemperate and inaccurate statements, this reply is submitted ~~so that~~ the Court may be made aware of just what respondent is about.

ARGUMENT.

I.

Contrary to Respondent's Naked Accusations, There Is No Evidence to Support the Court of Appeals' Holding (1) That Searle's Testimony Was Hearsay or (2) That Schmidt Had Had to Make Any Assumptions.

For all its irresponsibility, respondent has maintained a certain consistency throughout these appellate proceedings: it remains completely silent on the merits.

When our petition for a rehearing informed the Court of Appeals of its manifest error in its finding that Schmidt had to make certain assumptions in the face of a record devoid of such evidence, this respondent stood mute and suggested nothing to support such a finding. We now find that after the fury of its argument has dissipated, respondent is still speechless on this issue. It has cited this Court to absolutely nothing in the trial record notwithstanding bald assertions such as this at page 6 of its brief:

> "In so contending, petitioner flies in the face of Searle's candid and explicit testimony to the contrary."

What "candid" testimony? What "explicit" testimony? What are the page references? Where may this Court find a shred of evidence to demonstrate that Searle did *not* personally check the entire report? Where is the "record" respondent describes when it says at page 6 of its brief that "The record is unequivocally to the contrary . . ."?

On petition for rehearing below we pointedly informed the Court of Appeals that plaintiff's case was barren of any evidence that Schmidt made any assumptions. Defendant stood mute then. Now at page 7 of its brief it comes forward arguing not that Searle testified contrarily, not

that there is any evidence in plaintiff's case to show that assumptions *were* made but that our ". . . tactic . . . is to twist a negative answer—a disclaimer of knowledge—into authority for an affirmative proposition. . . ."

In fact, this is what we *did* say at page 17 of our Petition:

> "Searle was asked on cross-examination whether he knew of his own knowledge that Schmidt had made any assumptions and his answer was 'No, sir' (254a)".

If this be "twisting" anything, that verb should now have added to its definition: to describe accurately.

Finally driven to say something, respondent now finds itself unavoidably having to confess that the Court of Appeals *did* stamp the testimony of defendant's witness LaVake as credible. But rather than do so, it behaves as if attacks on the motives of counsel will ameliorate the harm the decision below inflicted on trial by jury.

The record before Chief Judge Clary, as contradistinct from respondent's imagined record, justified these conclusions:

> 1. Searle checked Schmidt's calculations predicated on the figures Searle had given to him. The testimony was therefore not hearsay. That determination was one involving a preliminary question of fact which an appellate court has no power either to make or disturb if it be fairly supported by the evidence, as surely this was. *Gila Valley, G. & N. R. Co. v. Hall*, 232 U. S. 94, 34 S. Ct. 229 (1913). Respondent refused to face this authority or the actual record which fully justifies *Gila's, supra*, application.
>
> 2. Schmidt made no assumptions. The fact that LaVake's testimony was the only evidence in the record asserting that there was one assumption does not justify the Court of Appeals crediting that *oral* testimony which appeared *only* in defendant's case,

not that of the plaintiff. The jury alone had the right, either to accept or reject such oral testimony. They did not believe it, and the command of the VIIth Amendment of the Constitution ends the matter there. The Court of Appeals erred in not accepting such a conclusion. It had no power to do otherwise. In doing otherwise, it deprived petitioner of her right to trial by jury. That is one of the reasons we are now here.

II.

The "Inducement" of Judge Kalodner.

In footnotes at pages 3 and 7 of respondent's brief appear statements about Judge Kalodner's dissent. These statements accuse counsel of sinister designs and Judge Kalodner of having been guiled.

As to the accusations against us: we protest.

As to the implications about Judge Kalodner: to defend a member of the federal judiciary against such charges would take even more effrontery than respondent displays in making them.

Let it be noted that Judge Hastie also voted to grant our Petition for a Rehearing. What theory has respondent about Judge Hastie's vote? What has respondent to say about the gullibility of that member of the Court of Appeals?

III.

Respondent Misquoted the Trial Record.

At page 6 of respondent's brief appears this alleged colloquy from the trial record of Searle's testimony:

> "Q. Do you know how Mr. Schmidt did this or what computations he used in arriving at these figures?
>
> A. No, sir; I *did* not." (Emphasis supplied.)

In fact, this is what Searle's answer was in the trial record:

"A. No, sir; I *do* not." (254a) (Emphasis supplied.)

Considering how unsparing and how undocumented respondent's treatment of the record has been, it is perversely consistent indeed for when it does quote from the record, it is inaccurate. If this arose from simple carelessness, it was inexcusable for respondent to allow that sort of thing to get before this Court. If it arose from something else, carrying implications which only respondent could disclose, it speaks disturbingly again of just how this meritorious Petition has been resisted.

Evasion rather than confrontation; accusations rather than responsible discussion; hollow statements and misquotation rather than documented treatment of this record — such has been the respondent's presentation of this case.

IV.

Both 49 U. S. C. § 1441(e) and the Federal Business Records Act, 28 U. S. C. § 1732(a) Are Squarely Raised by the Decision Below.

The argument respondent makes at page 8 of its Brief is written as if the opinion below did not exist. In truth, that opinion unequivocally *construed and applied* both 49 U. S. C. § 1441(e) and the Federal Business Records Act, 28 U. S. C. § 1732(a), and that opinion is now both the law in this case and an appellate holding which will be used as an authority for bench and bar on the two statutes involved.

The decision below did not dispose of the question of the Business Records Act on any such grounds as the lack of a formal offer. On the contrary, and, as the Court of Appeals said, "[m]ore fundamentally" (7c) involved was the relationship between the two statutes on this evidence.

If this case has to be retried, the trial judge will be bound to the law of the case laid down by the Court of Appeals. Unquestionably the trial judge will have to reject the report as a business record. Thus respondent's argument amounts to no more than an attempt to foreskill the review of a matter which was squarely resolved.

Furthermore, the opinion of the Third Circuit creates an intolerable situation when it is studied with respect to its ruling on the relationship between § 1441(e) and the Business Records Act.

This opinion undoubtedly will be of extreme importance to lawyers and trial judges on questions of admissibility of C. A. B. evidence in future air disaster cases. In its initial discussion of the prohibition of § 1441(e) the opinion is quite clear. It holds that the purpose of the provision is to exclude those portions of ". . . CAB reports which express agency views as to the probable cause of the accident". (6c). The opinion then specifically holds that:

> ". . . the testimony of Searle as to the calculations made by Schmidt certainly does not come within the ambit of the privilege. His was not evaluation or opinion testimony, for it reflects in no way the CAB's findings as to the probable cause of the crash." (6c)

Thus far the opinion is clear and correct. Its holding cannot be misconstrued, and it states a definite rule which trial courts and lawyers may properly follow.

But the opinion then states:

> ". . . to admit these reports for the reason plaintiff names would be to ignore explicit congressional policy, [fn.] which we decline to do." (8c)

Is a trial judge to be governed by the previous statement and admit those portions of the report which do not

reflect the probable cause of the accident, or is he to follow the later conflicting statement and reject them on the basis of "explicit congressional policy"?

We submit that these questions demand review and that this Court should take this opportunity to clarify the law of the Business Records Act in air disaster cases and all other cases as well.

CONCLUSION.

Genuine and important issues are at stake here. They measure up to the conditions which justify the grant of the Writ. Respondent has shown literally nothing to dilute the merit of our prayer. Its most unfortunate mistreatment of the case only underscores the need for the grant of that prayer.

The Writ should issue.

Respectfully submitted,

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